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Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court No. 76-1370

Court of Appeals No. 75-1913

ALBERT PINERO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court No. .....

Court of Appeals No. 75-1915

ALBERT PIERRO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, entered February 27, 1976 and judgment in accordance with that Opinion, hereinafter set forth as Appendix A and the District Court's Memorandum Opinion entered on June 9, 1975 is appended hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC 1254.

QUESTION PRESENTED

The question presented by this Petition is: was it error for the district court to accept a plea of guilty where the record indicates that no inquiry was ever made to determine whether or not the petitioner undertsood the nature of the charge?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Amendment V.

Rule 11 of the Federal Rules of Criminal Procedure (1953).

STATEMENT OF THE CASE

On September 27, 1951, Petitioner was charged in a seven-count Indictment in the Eastern District of Michigan, Southern Division, with having violated various Federal Narcotics Laws: more specifically, 18 USC §371, and §1716, 21 USC §174 and 26 USC §2553(a). On June 9, 1953, Petitioner was arraigned on the charges contained in the Indictment and entered a plea of not guilty to the same. On July 8, 1953, Petitioner withdrew his plea of not guilty and entered a plea of guilty to Count I of the Indictment whereby the government moved to dismiss the

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remaining Counts in the Indictment. Petitioner was thereafter sentenced, on October 22, 1953, to a term of 3 years imprisonment, said sentence being served in its entirety.

Subsequently, on April 26, 1972, Petitioner was convicted in the Federal District Court for the Southern Division of New York of Conspiracy to Violate Federal Narcotics Laws and Possession of Narcotics with Intent to Distribute. Pursuant to said conviction on June 20, 1972, Petitioner was sentenced as a second offender, based on his 1953 conviction, to term of 20 years imprisonment.

On June 6, 1974, Petitioner filed a pro se petition for a Writ of Error Coram Nobis in the District Court for the Eastern District of Michigan, Southern Division. (A supplemental petition was thereafter filed on November 6, 1974 by retained counsel.) On June 9, 1975, the District Court entered its Opinion and Order denying the petition for a Writ of Error Coram Nobis. On June 18, 1975, Petitioner filed notice of appeal from the District Court's Opinion and Order as a matter of right. The Court of Appeals, in a per curiam opinion, affirmed Petitioner's conviction on February 27, 1976.

This is Petitioner's petition for a Writ of Certiorari.

REASON FOR GRANTING THE WRIT

Petitioner's position, simply stated, is that his conviction and subsequent confinement were in derogation of his right to Due Process as guaranteed by the Fifth Amendment to the United States Constitution and, more specifically, Rule 11 of the Federal Rules of Criminal Procedure, in that, the Court failed to determine that the plea was made with understanding of the nature of the charge.

In 1953, when Albert Pierro plead guilty to conspiracy to violate Federal Narcotics Laws, Rule 11 of the Federal Rules of Criminal Procedure read, in part:

> A Defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendre.* The court may refuse to accept a plea of guilty, and shall not accept the plea without just determining that the plea is *made voluntarily with understanding of the nature of the charge.* (Emphasis supplied.)

In the instant case, the Court made no effort to determine whether the Petitioner understood the nature of the charge. Also, noteworthy, is the fact that at the time he entered his plea of guilty, Petitioner was a young man of limited education, facing his initial contact with the law, with no legal training or knowledge whatsoever.

The actual colloquy between the Court and Pierro was so sparse that it is easily set forth herein:

> The Court: What about the defendant Pierro?
> Mr. Louisell (Defense Counsel): With respect to the Defendant Pierro he asks leave of this Court to withdraw his plea of not guilty heretofore entered and offers a plea of guilty to the first Count

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of the Indictment. The first Count is the Count which charges a conspiracy.

The Court: Are you Albert Pierro?

Defendant Pierro: Yes, sir.

The Court: You have heard your lawyer, Mr. Louisell, say to the Court that you desire to withdraw your plea of not guilty for the first Count in the Indictment and plead guilty to the first Count in the Indictment. Is that your wish?

Defendant Pierro: Yes.

The Court: Do you plead guilty to the first Count of the Indictment because you really are guilty of the offense set out in the first Count of the Indictment?

Defendant Pierro: Yes.

The Court: Has anyone pressured you to plead guilty to the first Count of the Indictment?

Defendant Pierro: No.

The Court: Did anyone say to you the Court will deal leniently with you or give you any consideration for your plea to the first Count of the Indictment rather than stand trials? Did anyone tell you that?

Defendant Pierro: Yes. No, they didn't.

The Court: All right the Court will accept your plea of guilty to the first Count of the Indictment.

Nowhere does the Court even allude to, let alone determine, whether or not Pierro knows what the crime he is charged with is let alone its nature. The Court could have read Pierro the Indictment, or asked him if he knew what was in the Indictment, or explained to him something about the charge against him, or asked him if his attorney had advised him of the nature of the charge, but the Court did none of these things. For all that is shown in the transcript of the plea Pierro may have thought he was plead-

ing guilty to conspiracy to commit treason, or arson, or sodomy. Furthermore, the Court failed to determine whether Pierro knew what the maximum charge was he faced by pleading guilty to the charge to which he plead. If the phrase, "understanding of the nature of the charge" includes anything at all within its ambit it must at least include the name of the crime.

Furthermore, the District Court, in its memorandum Opinion, stated:

> At the time of his plea, petitioner was represented by an able criminal practitioner. A considerable length of time elapsed between petitioner's arraignment and trial. He and his attorney certainly had conferences to prepare for trial, and it is inconceivable that petitioner was not thoroughly advised of the nature of the charges and the consequences of conviction by trial or plea.

This finding, by the District Court, is totally unsupported by the record herein. Nowhere in the instant reocrd is there even a scintilla of testimony to support the conclusion that the defendant was advised of the nature of the charges and consequences of a conviction. The mere fact that petitioner was represented by able counsel, in and of itself, is insufficient to support the inference that the petitioner was, in fact, advised of the nature of the charge.

The representation of petitioner by counsel does not relieve the Judge of his responsibility as stated in *United States v Diggs,* 304 F2d 929, 930 (6th Cir 1962):

> Although appellant was represented by an attorney when he entered his plea of guilty, there is authority to the effect that a District Judge is not relieved of the duty which is imposed upon him by Rule 11

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> solely because the defendant is represented by counsel of his own choice. *United States v Davis,* 212 F2d 264, 266, CA 7th; *Gundlach v United States,* 262 F2d 72, 76, CA 4th, *cert denied,* 360 US 904, 79 S Ct 1283, 3 L Ed 2d 1255; *Reed v United States,* 291 F2d 856, 858, CA 4th. See: *Howard v United States,* 196 F2d 778, 780, CA 6th. The presence of counsel in a criminal case is a circumstance which may fairly be taken into account in determining the nature and extent of the inquiry to be made, but it does not by itself fulfill the requirements of Rule 11 in accepting a plea of guilty. *Gundlach* v *United States, supra,* 262 F2d 72, 76, CA 4th, *cert denied,* 360 US 904, 79 S Ct 1283, 3 L Ed 2d 1255.

In *United States* v *Swaggerty,* 218 F2d 875 (7th Cir. 1955), the Court, in discussing the ascertainment of defendant's knowledge in a plea taking proceeding, said:

> A brief discussion with a defendant regarding the nature of the charges may normally be the simplest and most direct means of ascertaining the state of his knowledge. *Or there may be other circumstances from which it is evident that the defendant has the requisite understanding.* (Emphasis supplied.)

The record in this case is conspicuously lacking in "circumstances from which it is evident that the defendant has the requisite understanding."

What the District Court did, in effect, was to engage in unwarranted assumptions regarding petitioner's subjective state of mind at the time he entered his plea of guilty. While petitioner recognizes that a reviewing Court may look to "other circumstances from which it is evident that the defendant has the requisite understanding". *United*

States v Swaggerty, supra, petitioner submits that the Court is bound by the record and cannot engage in assumptions to save an otherwise invalid plea.

The Court of Appeal, finding that petitioner was represented by able counsel, assumed that petitioner had the requisite understanding of the nature of the charge. This action by the Court of Appeal, in assuming that petitioner had a sufficient understanding, is totally at odds with case law.

In all cases where Courts have looked to, and relied upon, "other circumstances" those circumstances have always appeared on the record and usually involve a statement given by the defendant's attorney. There is not one instance where a Court, in looking to "other circumstances" engaged in factual assumptions which did not appear in the record.

To conclude that simply because a lengthy period of time elapsed between the arraignment and trial is sufficient grounds to support the assumption that the petitioner was properly advised as to the nature of the charges against him is, at best, stretching the record to the extreme.

In *Julian v United States,* 236 F2d 155 (6th Cir 1956), the Court said:

> In order to comply with the rule the District Court need not follow any particular ritual. The prerequisite is that the defendant *understand the consequences of the plea, United States v Swaggerty,* 218 F2d 875 (7th Cir 1955). A brief discussion with the defendant regarding the nature of the charges may normally be the simplest and most direct means of ascertaining the state of his knowledge.

> *United States v Davis,* 212 F2d 264 (7th Cir 1954). 236 F2d at 158 (Emphasis supplied.)

Presumably, the consequences of the plea which the petitioner should understand include at least the potential length of his upcoming prison term, but whatever they might include the Judge in the instant case failed to determine petitioner's understanding of anything at all which might be called consequences of the plea. To the same effect as *Julian, supra,* See *Fultz v United States,* 365 F2d 404 (6th Cir 1966).

In *United States v Morgan,* 346 US 502, 73 S Ct 247, 98 L Ed 248 (1953), a case strikingly similar to the one at bar, this Honorable Court held that the writ of error coram nobiis was available to a defendant in practically the identical situation as the case at bar. In *Morgan,* the defendant was attacking a 1939 conviction based upon a plea of guilty for which he had already served the sentence, but which served to enhance the sentence he was given as a second offender in a 1950 conviction. Like petitioner the defendant in *Morgan* alleged at the time he plead guilty that he was young, without knowledge of the law, and not advised as to his rights. This Court concluded that the barren record did not support a valid waiver of constitutional rights, when it stated:

> In this state of the record we cannot know the facts and thus we must rely on respondent's allegations. 346 US at 513.

A reading of the transcript herein shows that the Judge did nothing which could qualify as compliance with the Rule 11 requirement that he determine that the petitioner understand the nature of the charge and nothing in the record even remotely suggests that petitioner was aware of the nature of the charge to which he plead guilty.

CONCLUSION

Petitioner prays that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and hear this case on the merits.

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APPENDIX A

ORDER

NO. 75-1915

(U. S. Court of Appeals—Sixth Circuit)

(Filed February 27, 1976)

Albert Pierro,
Petitioner-Appellant,
v
United States of America,
Respondent-Appellee.

Before: Phillips, Chief Judge; Weick and Lively, Circuit Judges.

In this appeal from denial of a petition for a writ of error coram nobis the petitioner argues that the transcript of a guilty plea which he entered in a United States District Court on July 8, 1953 fails to disclose that the Judge who took the plea determined that the petitioner understood the nature of the charge to which he was pleading. An examination of the entire record including the pro se petition filed herein prior to petitioner's obtaining counsel leads to the conclusion that the petitioner did understand the nature of the charges against him and of the charge to which he pled guilty. The record does not disclose any violation of Rule 11 of the Federal Rules of Criminal Procedure as written at the time of the proceedings in 1953.

The judgment of the district court is affirmed.

Entered By Order Of The Court

/s/ John P. Hehman,
Clerk.

APPENDIX B

MEMORANDUM AND ORDER

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed June 9, 1975)

Albert Pierro,
Petitioner,
v
United States of America,
Respondent.

Civil No. 4-71808

On September 27, 1951, petitioner was charged in a seven-count indictment with violations of 18 U.S.C. §§2(a), 371 and 1716, 21 U.S.C. §174 and 26 U.S.C. §2553(a), all of which are narcotic offenses. Petitioner entered a plea of not guilty and was released on bond. On July 8, 1953, he withdrew his plea of not guilty and entered a plea of guilty to count 1 of the indictment. On October 2, 1953, petitioner was sentenced by the late Judge Theodore Levin to three years imprisonment, and at that time the government moved to dismiss the remaining six counts.

Petitioner completely served this sentence but is presently incarcerated as a consequence of a subsequent conviction. He filed this Petition for Writ of Error Coram Nobis to challenge the validity of his 1953 plea. A supplemental petition has now been filed by retained counsel. Collectively, these petitions allege that petitioner's plea was involuntary because: (1) he was unaware of the consequences of his plea; (2) he was unaware of the nature of the charges to which he was pleading guilty; (3) he did

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not knowingly and intelligently consent to a waiver of his constitutional rights; and (4) he was deprived of his Sixth Amendment right to effective assistance of counsel. The government's answer admits the facts recited by petitioner but denies the substantive allegations concerning the the involuntariness of his plea and the ineffectiveness of counsel.

The entire transcript of the proceedings is set forth in its entirety below:

> Mr. Louisell: May it please the Court, on behalf of the defendant Farrocco for whom I appear of record, the defendant asks leave of this court at this time to withdraw the plea of not guilty heretofore entered and offers a plea of guilty to the first and the fourth counts of the indictment.
>
> The Court: What about the defendant Pierro?
>
> Mr. Louisell: With respect to the defendant Pierro, he asks leave of this court to withdraw the plea of not guilty heretofore entered and offers a plea of guilty to the first count of the indictment. The first count is the count which charges a conspiracy.
>
> The Court: Are you Albert Pierro?
>
> Defendant Pierro: Yes, sir.
>
> The Court: You have heard your lawyer, Mr. Louisell, say to the court that you desire to withdraw you plea of not guilty for the first count in the indictment and plead guilty to the first count in the indictment. Is that your wish?
>
> Defendant Pierro: Yes.
>
> The Court: Do you plead guilty to the first count of the indictment because you really are guilty to the offense set out in the first county of the indictment?
>
> Defendant Pierro: Yes.

The Court: Has anyone pressured you to plead guilty to the first count in the indictment?

Defendant Pierro: No.

The Court: Has anyone promised you anything for your plea of guilty to the first count of the indictment?

Defendant Pierro: No.

The Court: Did anyone say to you the court will deal lieniently [sic] with you or give you any consideration for your plea to the first count of the indictment rather than stand trial? Did anyone tell you that?

Defendant Pierro: Yes. No, they didn't.

The Court: All right, the court will accept your plea of guilty to the first count of the indictment. What does the United States Attorney want to do with the other counts?

Mr. Fordell: The Government moves to dismiss the remaining counts but requests the court to defer the matter of dismissing those counts until such—

The Court: The Court will take the motion of the Government under advisement for dismissing the remaining counts in the indictment.

Since petitioner is no longer in custody, the appropriate remedy to test the issues presented is a writ of error coram nobis. *United States* v. *Morgan,* 346 U.S. 502 (1954). Generally, the writ is unavailable unless petitioner can prove that denial of the writ will result in tangible and measurable collateral consequences. *United States* v. *Morgan, supra,* at p 511. However, collateral consequences always flow from any conviction because subsequent convictions my carry heavier penalties and civil rights may be affected. Therefore, petitioner need not do any more than allege them in a conclusory manner. We believe, however,

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that the writ is available only to redress errors "of the most fundamental character." *United States* v. *Morgan, supra,* at p. 512 quoting *United States* v. *Mayer,* 235 U.S. 55 at p 69.

Petitioner's first three allegations are essentially that his guilty plea was involuntarily made and thus taken in derogation of Rule 11, Federal Rules of Criminal Procedure.

In 1953, Rule 11 provided:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty." See also *Julian* v. *United States,* 136 F.2d 155 (6th Cir. 1956).

What is necessary to comply with this rule is succinctly set out in the case of *United States* v. *Swaggerty,* 218 F.2d 875 (7th Cir. 1955) wherein the court said:

> It is true that Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides that the trial court shall not accept a plea of guilty without first determining that the plea is made voluntarily and with understanding of the nature of the charges. But, as we pointed out in *United States* v. *Davis,* 7 Cir, 212 F.2d 264, 267, it is not necessary for a District Court * * * in every case [to] follow a particular ritual in order to comply with Rule 11 A brief discussion with the defendant regarding the nature of the charges may

> normally be the simplest and most direct means of ascertaining the state of his knowledge. Or there may be other circumstances from which it is evident that the defendant has the requisite understanding.
>
> It is not necessary that such explanation be made by trial judge personally. It is sufficient if the defendant has the requisite understanding from another. *Michener* v. *United States,* 8 Cir., 181 F.2d 911, 918. The explanation of the charges and possible penalties made by the defendant's attorney satisfied Rule 11.

A thorough reading of the transcript of the plea in this case convinces us that petitioner voluntarily pled guilty. At the time of his plea, petitioner was represented by an able criminal practitioner. A considerable length of time elapsed between petitioner's arraignment and trial. He and his attorney certainly had conferences to prepare for trial, and it is inconceivable that petitioner was no thoroughly advised of the nature of the charges and the consequences of conviction by trial or plea. Additionally, the court asked petitioner specifically to which of the several counts in the indictment he wished to plead guilty. This count was then specifically stated by petitioner's attorney to be a conspiracy count. While the transcript does not reflect that the defendant was questioned as to what he thought a conspiracy was, nevertheless it is clear that the guilty plea to one specific count of a multiple-count indictment indicates an awareness of the charge singled out. The court then asked petitioner if he was really guilty of the charge contained in the count to which he was pleading guilty. These facts convince us that petitioner was well aware of the nature of the charges as required by Rule 11 at the time of his plea. It also appears from the record that the trial judge asked petitioner

whether he was offering the plea voluntarily. Petitioner responded that he was not promised anything for his plea nor was any pressure used to coerce his plea. This satisfies the requirement of Rule 11 that the trial judge determine the plea is made voluntarily.

Petitioner makes the further argument that he was denied effective assistance of counsel. The Sixth Circuit has now repudiated the "mockery" test for determining the effectiveness of counsel. The test for ineffective counsel requires us to determine whether counsel performed at least as well as a lawyer with ordinary training and skill in criminal law and whether counsel consicentiously protected his client's interest without being distracted by conflicting considerations. *Beasley* v. *United States,* 491 F.2d 687, 696 (6th Cir. 1974). Competency was further defined by the court as performance equal to that of a lawyer with ordinary skill and training in criminal law. Nothing in the record on the plea can even remotely suggest that petitioner's lawyer did not live up to this standard, and petitioner alleges no facts in support of his allegation. Nor does petitioner give any hint for assuming the district judge was not completely satisfied that counsel acted copetently and in petitioner's best interest.

Accordingly, the writ is denied.

/s/ Robert E. DeMascio
United States District Judge.

Dated: June 9, 1975.

APPENDIX C

JUDGMENT

(U.S. District Court—Eastern District of Michigan—Southern Division)

(Filed June 9, 1975)

This action came before the court on petitioner's petition for writ of error coram nobis and a supplementary petition filed by retained counsel, and a decision having been duly rendered,

It Is Ordered And Adjudged

that the petitioner is entitled to no relief and that the action be dismissed on the merits.

Dated at Detroit, Michigan, this 9th day of June, 1975.

/s/ Robert E. DeMascio
United States District Judge.